

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF ISSAQUAH**

In the Matter of the Application of)	VAR15-00001
)	
Dan Buchser, on Behalf of James)	Chowanski-Garris Residence
Chowanski and Marcy Garris)	
)	
)	FINDINGS, CONCLUSIONS,
<u>For Approval of a Variance</u>)	AND DECISION

SUMMARY OF DECISION

The request for approval of a variance to allow construction of a single-family residence at 5104 NW Sammamish Road, Issaquah, Washington, is **APPROVED**. Conditions are necessary to mitigate impacts and to ensure that the project complies with federal, state, and local statutes, ordinances, and regulations.

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the request on September 24, 2015.

Testimony:

The following individuals presented testimony under oath at the open record hearing:

Peter Rosen, City Senior Environmental Planner
Dan Buchser, Applicant Representative

Exhibits:

The following exhibits were admitted into the record:

1. Land Use Permit Application, received April 17, 2015
2. Vicinity Map, undated
3. Site Plans and Critical Areas Report, MacPherson Construction & Design, dated April 17, 2015
4. Affidavits of Public Notice:
 - a. Affidavit of Sign Installation, dated September 17, 2015
 - b. Affidavit of Service of Mailing, dated August 27, 2015
 - c. Affidavit of Publication, *The Issaquah Press*, dated September 8, 2015
 - d. Affidavit of Publication, *The Issaquah Press*, dated June 4, 2015
5. Public and Agency Comments:
 - a. E-mail from Karen Walter to Peter Rosen, dated September 16, 2015, with attached e-mail string
 - b. E-mail from Joy Gamble to Peter Rosen, dated September 6, 2015

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- c. E-mail from Steven Looper to Peter Rosen, dated August 31, 2015, with attached comment letter
- 6. River & Stream Board Public Meeting Minutes, dated June 2, 2015
- 7. SEPA Determination, issued August 27, 2015
- 8. Staff Report, dated September 24, 2015

The Hearing Examiner enters the following Findings and Conclusions based upon the testimony and exhibits admitted at the open record hearing:

FINDINGS

Application and Notice

- 1. Dan Buchser, on behalf of James Chowanski and Marcy Garris (Applicant), requests a variance from the City of Issaquah's (City's) critical area regulations to allow construction of a single-family residence within the 100-foot buffer and 15-foot building setback required by the presence of a class II salmon-bearing stream at 5104 NW Sammamish Road.¹ The Applicant would mitigate the buffer encroachment by removing several existing structures and an asphalt driveway on the property, thereby reducing the total impervious surface area within the stream buffer; removing rockeries armoring the stream; grading the stream bank; planting a 30- to 50-foot wide buffer with native riparian plants; and removing an existing concrete boat ramp on the shore of Lake Sammamish. *Exhibit 1; Exhibit 3; Exhibit 7; Exhibit 8, Staff Report, page 2.*
- 2. City Senior Environmental Planner Peter Rosen testified that the City received the variance application on April 17, 2015, and deemed it complete shortly thereafter. The City published notice of the associated public meeting in *The Issaquah Press* on May 21, 2015. The City mailed notice of the application and the open record hearing to persons owning property within 300 feet of the subject property on August 27, 2015. The Applicant posted notice of the hearing on the property on September 17, 2015. *Exhibit 4a; Exhibit 4b; Exhibit 4d; Exhibit 8, Staff Report, page 3; Testimony of Mr. Rosen.*
- 3. The City received two comments in response to its notice materials. Nearby property owners Joy Gamble and Steven Looper both wrote expressing support for the variance request and proposed project. *Exhibit 5b; Exhibit 5c.*

State Environmental Policy Act

- 4. The City analyzed the environmental impacts of the proposal under the State Environmental Policy Act (SEPA), Chapter 43.21C RCW. The City determined that, with conditions, the request would not have a probable significant adverse impact on the environment and issued a Mitigated Determination of Nonsignificance (MDNS) on August 27, 2015. The MDNS conditions require the Applicant to modify the planting of

¹ The property is identified by King County Assessor Parcel Number 202406-9053. A legal description of the property is included with the variance application. *Exhibit 1.*

the riparian buffer, obtain Washington Department of Fish and Wildlife (WDFW) permission for the project and comply with WDFW guidance, submit buffer plans for approval, record the buffer as a Native Growth Protection Easement, and create a 5-year maintenance and monitoring plan for the buffer. The City published notice of the MDNS in *The Issaquah Press* on August 27, 2015. The MDNS was not appealed. *Exhibit 4c; Exhibit 8, Staff Report, page 3.*

5. Mr. Rosen testified that the City received one comment in response to the notice of the MDNS. The Muckleshoot Indian Tribe wrote to express support for expanding the dense stream buffer planting area from 10 to 15 feet, asked for clarification regarding a foot bridge over the salmon-bearing stream currently on the site, and asked for a drawing showing a cross-section view of the impediment removal and gravel enhancements for the stream. Mr. Rosen testified that the footbridge that concerned the Muckleshoot Tribe would be removed to mitigate project impacts. *Exhibit 5a; Testimony of Mr. Rosen.*

Comprehensive Plan, Zoning, and Surrounding Property

6. The property is designated Low Density Residential by the City Comprehensive Plan and is zoned Single-Family Small Lot (SF-SL). The primary purpose of SF-SL zoning is to provide for single-family development and neighborhoods. *Issaquah Municipal Code (IMC) 18.06.100.D*. The surrounding properties are also zoned SF-SL and are currently developed with single-family residences. *Exhibit 8, Staff Report, page 2.*

Existing Property

7. The property is an irregularly shaped lot, approximately one acre in size, located on the southern shore of Lake Sammamish. The parcel has a narrow frontage along the lake, expands in width to a maximum of 125 feet approximately 200 feet from the lake, constricts down to a little more than 60 feet wide just past the maximum width, then flares out again to approximately 100 feet in width where it fronts NW Sammamish Road. A class II salmon-bearing stream, West Village Park Creek, runs along the north-western property border and then into the lake.² Mr. Rosen testified that the stream is currently armored with rock and concrete shards. Mr. Rosen also testified that several outbuildings sit close to the stream and that a footbridge crosses the stream. A single-family home is currently sited close to the center of the lot, approximately 40 feet from the stream. A long asphalt drive runs along the south-eastern property border and ends at the lake as a concrete boat ramp. *Exhibit 3; Exhibit 7; Exhibit 8, Staff Report, page 2; Testimony of Mr. Rosen.*

Shoreline Management Act

8. The proposed residence would be located within 200 feet of the ordinary high water mark (OHWM) of Lake Sammamish. Consequently, the variance request is subject to the State

² Mr. Rosen testified that the upstream portion of West Village Park Creek is rated as a non-fish stream because of a culvert installed where the creek crosses under I-90, whereas the portion of the creek located along the property border has lake access, and is therefore considered a class II salmon stream. *Exhibit 7; Testimony of Mr. Rosen.*

Shoreline Management Act (SMA), Chapter 90.58 RCW, and the City's Shoreline Master Program (SMP). *RCW 90.58.030(d), .040*. The primary goal of the SMA is to protect the public interest in the state's shorelines through a coordinated development process. The SMA protects against adverse effects to public health, the land, vegetation, wildlife, and waters, and preserves the public's opportunity to enjoy the physical and aesthetic qualities of the natural shoreline to the greatest extent feasible. Permitted uses in shorelines must be designed and conducted in a manner to minimize damage to the ecology and environment of the shoreline area and to minimize any interference with the public's use of the water. Single-family residences are a permitted shoreline use under the SMA. *RCW 90.58.020. Exhibit 8, Staff Report, page 2.*

9. The City has incorporated its critical area regulations and variance criteria into its SMP. *Resolution No. 2011-11 (City of Issaquah, 2011)*. The City's critical areas regulations require a 100-foot buffer for class II salmon-bearing streams and a 15-foot building setbacks from the outer edge of critical area buffers, including those surrounding streams. *IMC 18.10.515.D; IMC 18.10.785.C.2*. A variance is required for any development that encroaches on a stream buffer by more than 25 percent of the standard stream buffer width. *IMC 18.10.790.D.2*. The Applicant proposes construction of a single-family residence approximately 30 feet from the stream, encroaching on the standard stream buffer width by more than 25 percent. *Exhibit 1; Exhibit 3; Exhibit 8, Staff Report, page 2.*
10. Mr. Rosen testified that the need for a variance arose from the configuration of the property. At its widest, the property is only 125 feet across. Given the stream buffer and building setback requirements of the municipal code, the configuration of the parcel makes the construction of a reasonably-sized residence impossible without a variance. *Exhibit 3; Exhibit 8, Staff Report, pages 4 and 6; Testimony of Mr. Rosen.*
11. Mr. Rosen testified that he did not believe approval of the variance would bestow a special privilege not enjoyed by other properties in the vicinity and zone. Mr. Rosen stated that the variance would allow construction of a single-family residence, the same use enjoyed by other properties in the area. Mr. Rosen noted that he believed allowing construction of a single-family residence on the property is consistent with the City's Comprehensive Plan, zoning scheme, and the SMA, which designates single-family homes as a priority use of the shoreline environment. *RCW 90.58.020. Exhibit 8, Staff Report, page 6; Testimony of Mr. Rosen.*
12. Mr. Rosen testified that, in his opinion, the most ecologically and environmentally important portion of a stream buffer is that portion closest to the stream. Currently the buffer has little to no vegetation planted in it, and several outbuildings and portions of the existing asphalt driveway are within the buffer. As a result, the buffer currently provides no significant habitat or water quality functions. Mr. Rosen testified that the proposed project, which would result in a restoration of native plants to the buffer area and the removal of the rockeries armoring the stream, outbuildings, a foot bridge, and the asphalt

driveway, would decrease the impervious area within the stream buffer and opined that the project would significantly improve the stream's ecology and habitat. Applicant Representative Dan Buchser testified that the project would result in the consolidation of the impervious surface area on the property. *Exhibit 3; Exhibit 7; Exhibit 8, Staff Report, page 4; Testimony of Mr. Rosen; Testimony of Mr. Buchser.*

13. Mr. Rosen testified that the City worked with the Applicant to minimize the size of the required variance. The Applicant proposes to site the residence as far as possible from the stream, given the shape of the parcel. *Exhibit 3; Exhibit 8, Staff Report, page 4; Testimony of Mr. Rosen.*
14. Mr. Rosen also testified that the parcel's size, 1 acre, would theoretically allow subdivision and that previous owners proposed doing so. Mr. Rosen opined that approving the request to allow construction of the proposed residence would prevent subdivision of the property, which would reduce development impacts and the need for further variances to develop the subdivided property. The record contains no evidence of any variance requests by surrounding property owners. *Exhibit 8, Staff Report, page 4; Testimony of Mr. Rosen.*

Staff Recommendation

15. City staff recommends approval of the variance, with conditions. These conditions require the Applicant to comply with the MDNS conditions; comply with all federal, state, and local statutes, ordinances, and regulations; obtain a Hydraulic Project Approval (HPA) permit, with any conditions of HPA approval becoming conditions of the variance approval; and obtain a City building permit before commencing clearing, grading, or construction activity. *Exhibit 8, Staff Report, pages 8 and 9.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction to hear and decide variance applications. The Hearing Examiner may approve, approve with conditions, or deny a variance application based on the decision criteria, staff report, public comments, and discussion of the issues. *IMC 18.04.490.B.*

Criteria for Review

Variances from critical areas regulations are decided using approval criteria found in *IMC 18.04.490.B.2* and *IMC 18.10.430.D.* *IMC 18.04.490.B.2; IMC 18.10.430.C.* Before any variance may be granted, the Applicant must show:

- a. The variance is in harmony with the purpose and intent of the relevant City ordinances and the Comprehensive Plan;
- b. The variance shall not constitute a grant of special privilege which would be inconsistent with the permitted uses, or other properties in the vicinity and zone in which the property is located;

- c. The variance is necessary because of special circumstances relating to the size, shape, topography, location or surroundings of the property, and such variance will provide use rights and privileges permitted to other properties in the vicinity, located in the same zone as the property, and developed under the same land use regulations as the property requesting the variance;
- d. The granting of such variance would not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the subject property is situated;
- e. Alternative development concepts in compliance with the existing Code have been evaluated and undue hardship would result if such strict adherence to Code provisions is required;
- f. The variance granted is the minimum amount necessary to comply with the approval criteria listed above and the minimum necessary to accommodate the permitted uses proposed by the application; in addition, the scale of the use has been reduced as necessary to meet this requirement; and
- g. The basis for the variance request is not the result of deliberate actions of the applicant or property owner.

IMC 18.04.490.B.2; IMC 18.10.430.D.

In addition:

In the granting to variances from this Code, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if variances were granted to other developments in the area where similar circumstances exist, the total of the variances should also remain consistent with the policies and intent set forth in this chapter.

IMC 18.10.430.G

The regulations implementing the SMA also contain variance criteria.³ Under those regulations, an applicant seeking a variance for development landward of the OHWM may receive a variance if:

- 1. Denial of the variance would thwart a goal of the SMA, the need for the variance arises from extraordinary circumstances, and the granting of the variance would not substantially and detrimentally affect the public interest;
- 2a. Strict application of the bulk, dimensional, or performance standards set forth in the applicable SMP would preclude, or significantly interfere with, reasonable use of the property;

³ Mr. Rosen testified that, because the Washington State Department of Ecology must approve any shoreline variance, the City analyzed the variance under both its criteria and Ecology's. *Testimony of Mr. Rosen; see RCW 90.58.140(10).*

- 2b. The hardship created by strict application of the bulk, dimensional, or performance standards in the applicable SMP is specifically related to the property and is the result of unique conditions such as irregular lot shape, size, or natural features, and not from deed restrictions or the applicant's own actions;
- 2c. Design of the project is compatible with other authorized uses within the area and with the uses planned for the area under the relevant Comprehensive Plan and SMP and will not cause adverse impact to the shoreline environment;
- 2d. Approval of the variance would not grant a special privilege not enjoyed by other properties in the area;
- 2e. The variance requested is the minimum necessary to afford relief;
- 2f. Approval of the variance will not result in substantial and detrimental effect on the public interest . . .
- 4. Consideration has been given to the cumulative impact of additional requests for like actions in the area;
- 5. Variances from the use regulations of the SMP are prohibited.

WAC 173-27-170.

Conclusions Based on Findings

1. **With conditions, the request and proposed project would satisfy the variance criteria in the City's SMP.** The Applicant seeks to build a single-family residence on the property. The use would be consistent with the Comprehensive Plan and zoning designation of the property, SF-SL, which the City utilizes to promote single-family residential development. Other properties in the vicinity are also developed with single-family residences, so granting the variance request would not result in bestowing a special privilege on the Applicant: it would simply allow the Applicant to put the property to the same use as surrounding properties. The variance is necessary because of the shape of the property, which is only 125 feet wide at its maximum width. Given that the IMC requires a 100-foot buffer for class II salmon streams and 15-foot building setbacks from the edge of a critical area buffer, the Applicant could not build a reasonably-sized single-family residence without a variance. With conditions, the variance and proposed project would not be detrimental to the public welfare or injurious to the property or improvements in the area. The City determined that, with conditions, the variance and proposed project would not result in significant adverse environmental impacts, and the City's determination was not appealed. Further, the Applicant proposes several mitigation measures that would result in significant improvement to the ecology and environment of the on-site stream, including rehabilitating the stream channel, itself; removing structures and asphalt currently within the stream's buffer; and buffering the stream with 30 to 50 feet of native riparian plants. The variance and proposed project would ensure the parcel is not subdivided, minimizing developmental impacts. The variance and proposed project, which is limited to construction on the parcel, would not result in any damage to surrounding improvements. The Applicant and the City

considered alternative development concepts, but the parcel's minimal width rendered its use for any single-family residence impracticable without the variance. The Applicant worked to minimize the variance request by siting the proposed residence as far as possible from the stream. By preventing the parcel's subdivision, the proposed project would reduce the likelihood that the parcel's shape would require further variances to allow building on the lots produced by any subdivision. Finally, the variance is sought because of the shape of the parcel, which was established before the City enacted buffer requirements; the variance does not result from the Applicant's own actions.

Conditions are necessary to mitigate specific project impacts. Those conditions include requiring the Applicant to comply with the conditions of the MDNS; comply with all federal, state, and local statutes, ordinances, and regulations; obtain an HPA permit, with any conditions of HPA approval becoming conditions of the variance approval; and obtain a City building permit before commencing clearing, grading, and construction activity. *Findings 1, 4, 6-15.*

2. **Consideration has been given to the cumulative impact of additional requests for like actions in the area.** Nothing in the record indicates that other properties bordering the stream would need buffer and setback variances. Regardless, the extensive mitigation measures proposed by the Applicant would result in significant improvement to the ecology and habitat of the stream. Given the proposed rehabilitation of the stream and its buffer, the cumulative impacts of the Chowanski-Garris variance and any similar variances would not likely result in adverse impacts. *Findings 1, 12, 14.*
3. **With conditions, the request and proposed project would satisfy the variance criteria found in WAC 173-27-170.** Approval of the variance would prevent the parcel's limited width and the presence of a class II salmon-bearing stream on the property from thwarting a policy found in the SMA, specifically the priority for single-family residences in alternations to the shoreline found in RCW 90.58.020. As the variance would allow construction of a single-family residence on Lake Washington, it is consistent with the City's SMP and SMA, which prioritize single-family residences. As discussed above, the variance request is consistent with the City's Comprehensive Plan; arises from extraordinary circumstances, namely the parcel's minimal width and the buffer and setback requirements of the IMC; would not detrimentally affect the public welfare or injure property; would not result in any special privilege for the Applicant; and would not result in cumulative detrimental impacts. The variance is the minimum needed for relief from the IMC's buffer and setback provisions and does not arise from deed restrictions or the Applicant's actions. As discussed, the project would not have an adverse impact, even when considered along with other possible requests for like actions in the area. As discussed above, conditions are necessary to minimize project impacts. *Findings 1, 4, 6-15.*

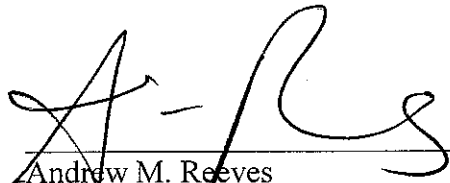
DECISION

Based on the preceding Findings and Conclusions, the request for a variance from City of Issaquah Critical Areas Regulations to allow construction of a single-family residence at 5104 NW Sammamish Road in Issaquah, Washington, is **APPROVED**, with the following conditions:

1. The Applicant shall comply with the following conditions of the Mitigated Determination of Nonsignificance, dated August 27, 2015:
 - a. The dense stream buffer planting adjacent to the stream shall be increased to a 15-foot width to allow more plant triangular spacing to improve shade and cover for the stream. This buffer planting shall adhere to the King County mitigation guidelines for planting density.
 - b. The cobble/gravel placement along the lakeshore and gravels within the stream channel shall meet specifications of the Washington Department of Fish and Wildlife (WDFW). The gravel augmentation along the lakeshore shall extend waterward of the ordinary high water mark (OHWM), subject to approval by WDFW.
 - c. The Applicant shall coordinate with and receive WDFW approval for a stream bypass, seasonal construction timing limits, and temporary erosion sedimentation control (TESC) measures for the proposed work.
 - d. Final stream buffer enhancement plans are required for approval by the Issaquah Development Services Department (DSD) prior to issuing construction permits. Final plans shall include a grading plan, planting plan and a 5-year monitoring/maintenance plan with performance standards for monitoring success of the enhancement planting. The plans shall meet King County Critical Areas Mitigation Guidelines for monitoring performance standards.
 - e. The Applicant shall provide an as-built plan of the stream buffer enhancement and the consulting biologist shall verify in writing that the planting has been installed per plan prior to the final approval of the building permits.
 - f. The planted stream buffer area shall be recorded on the property title as a Native Growth Protection Easement (NGPE), prohibiting construction and improvements in the buffer area to preserve the planted native riparian vegetation. The NGPE shall be recorded prior to final building permit approval.
 - g. A 5-year monitoring/maintenance period is required for the stream buffer enhancement. The Applicant shall provide a bond amount equal to 50 percent of the cost of the plants, labor, and the 5-year monitoring/maintenance cost prior to final building approval.

2. The Applicant is responsible for permits and compliance with all federal, state, or local statutes, ordinances, or regulations applicable to this project.
3. Any conditions of Hydraulic Project Approval (HPA) from the WDFW shall be considered conditions of this permit. The Applicant shall provide copies of the HPA from WDFW prior to issuance of construction permits.
4. A city of Issaquah Building Permit shall be approved prior to commencing clearing, grading, and construction activity.

Decided this 6th day of October 2015.



Andrew M. Reeves
Hearing Examiner
Sound Law Center